

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

KENNETH WALTON GEORGE, DENNIS)
REED BOWEN, CLYDE FREEMAN,)
GEORGE MOYERS, JIM MATTHEWS,)
and HENRY MILLER, on their own behalf)
and on behalf of a class of persons similarly)
situated,)

Plaintiffs,)

Case No.: 8:06-cv-00373-RBH

vs.)

DUKE ENERGY RETIREMENT CASH)
BALANCE PLAN and DUKE ENERGY)
CORPORATION,)

Defendants.)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR *IN CAMERA*
REVIEW, TO ABROGATE PRIVILEGE, AND TO COMPEL

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Defendants Duke Energy Corporation (“Duke”) and the Duke Energy Retirement Cash Balance Plan (the “Plan”) (collectively, “defendants”) submit this memorandum in opposition to Plaintiffs’ Motion for *In Camera* Review, to Abrogate Privilege, and to Compel (the “motion” or “plaintiffs’ motion”).

INTRODUCTION

Effective January 1, 1997, Duke converted its prior pension plan design to a cash balance plan design. In 1997, Duke filed an application for a favorable determination letter from the Internal Revenue Service (“IRS”) regarding the Plan. A favorable determination letter is a determination by the IRS that an employee benefit plan complies with the requirements for a tax-qualified plan under the Internal Revenue Code. The IRS provided a favorable determination letter for Duke’s Plan in April of 1998.

Since 1997, Duke has made various amendments to the Plan. Duke amended and restated the Plan effective January 1, 1999 (the “1999 Plan”). The 1999 Plan added Section 5.04(c), which plaintiffs contend requires the Plan to make “whipsaw” payments. In December of 2001, Duke applied for a favorable IRS determination letter with regard to the 1999 Plan. As was the case with respect to Duke’s prior applications, Duke gave its employees written notice of the 2001 application and advised them of their right to submit comments to the IRS. During the course of Duke’s discussions with the IRS, Duke sent the IRS a proposed amendment to the 1999 Plan which states that a lump sum payment of a participant’s benefit “shall be equal to the Cash Balance Account.” (Exh. A). The IRS approved the proposed amendment and issued a favorable determination letter for the 1999 Plan on February 23, 2009. (Exh. B). Duke executed the Plan amendment on March 30, 2009. (*See* Exh. A).

While the determination letter application for the 1999 Plan was pending, Duke executed an amendment and restatement of the Plan effective January 1, 2009 (the “2009 Plan”). The 2009 Plan was executed on January 27, 2009, and a copy of the 2009 Plan was produced to plaintiffs on February 2, 2009. Section 5.04(c) of the 2009 Plan (as well as other provisions) is identical to Section 5.04(c) of the 1999 Plan amendment that was approved by the IRS and executed by Duke on March 30, 2009, and states that a participant’s lump sum payment will equal the cash balance account.¹

On October 2, 2009, Duke produced the 1999 Plan amendment to plaintiffs. Plaintiffs subsequently requested discovery into the process that culminated in the favorable IRS determination letter for the 1999 Plan. Duke voluntarily supplemented its prior discovery and produced all non-privileged documents. Duke also presented two witnesses for deposition, one pursuant to a Rule 30(b)(6) notice.

Plaintiffs do not claim that they were unable to obtain the additional discovery that they requested. Their only objection is one of timing: they say Duke should have made an earlier, rolling supplementation of its document production so that plaintiffs would have received the documents regarding the determination letter process in something approaching real time. Based solely on a claim that the production was tardy—and another, spurious claim that Duke prepared an earlier Federal Rule 30(b)(6) witness in a manner designed to evade disclosure of the dealings with the IRS—plaintiffs argue that they should be allowed to pierce the protection afforded to attorney-client privileged communications and attorney work product under a “crime/fraud” exception.

¹ The impact of the 2009 Plan change and the 1999 Plan amendment is identical because defendants are not asserting that the 1999 Plan amendment should be construed or enforced retroactively to moot plaintiffs’ claims.

Plaintiffs' request for this extraordinary relief is unsupported factually and legally.² Plaintiffs cannot turn routine discovery squabbles, all of which were resolved without so much as a single order from this Court on a contested motion, into a "crime" by directing a virtually endless stream of personal invective against Duke's counsel. Undoubtedly, plaintiffs would not be focused on personal attacks and the discovery process if discovery had yielded any fruitful evidence for plaintiffs. It did not. The IRS determination letter merely provides additional evidence that there is no legal basis for plaintiffs' whipsaw claim. (Exh. B). Cognizant of the upcoming deadline for filing summary judgment motions, plaintiffs attempt to shift the focus away from the impact of the favorable determination letter by manufacturing allegations against Duke's attorneys. There was no crime here, nor was there a fraud on the Court. The motion should be denied.

FACTS

Plaintiffs' request for this Court to abrogate Duke's attorney-client privilege and work product protection is premised upon three assertions. They claim that Duke wrongfully delayed in producing one box of documents relating to the IRS determination letter process, that a Rule 30(b)(6) witness supposedly failed to adequately answer *one* question posed to him at a deposition in February of 2008, and that counsel objected to a question about the determination letter received by Duke in 1998. Plaintiffs' recitation of "facts" is erroneous.

I. THE DOCUMENT PRODUCTION ISSUES.

Since 2006, plaintiffs have asserted a wide variety of claims against Duke, including age discrimination, claims under ERISA for backloading and whipsaw, claims regarding the

² Plaintiffs' motions have been filled with objectionable and hostile rhetoric. Defendants have not responded to plaintiffs' personal attacks in kind because they recognize that the motion will be decided on the applicable facts and law, and not based on the number of personal insults, adjectives and adverbs used in briefing.

applicable interest crediting rate for the Plan, and an ever evolving series of challenges under ERISA's fiduciary requirements. Although the scope of the case was subsequently narrowed by virtue of motion practice, plaintiffs have pursued discovery under all of the claims they asserted, and Duke provided a significant number of documents at a substantial burden to Duke. There has been no need for this Court to adjudicate a single discovery dispute.

On March 29, 2007, plaintiffs served a set of document requests. (Exh. C). None of the requests mentions the IRS determination letter applications. Plaintiffs' failure specifically to request documents regarding the determination letter process cannot be attributed to their ignorance of those proceedings. The letter now at issue was issued in response to an application filed by Duke in December of 2001, long before this action was even initiated. Duke was required to provide notice of the application to employees who were eligible to participate in the Plan (commonly referred to as the "Notice to Interested Parties" and herein as the "IRS Notice"). Duke provided its employees with the IRS Notice, and indeed, in this litigation, plaintiff Kenneth George produced out of his files a copy of a memorandum describing the IRS Notice, as well as the Notice itself. (Exh. D). Likewise, plaintiff James Matthews testified that he knew about Duke's application for a determination letter and recalled reading the IRS Notice on Duke's intranet site in 2001. (Matthews Dep. at pp. 176-78) (Exh. E). The memorandum produced by Mr. George was directed to all "[c]urrent employees of Duke Energy Corporation and Participating Affiliated Companies" and expressly stated:

On December 14, 2001, the Company intends to file an application with the Internal Revenue Service requesting a favorable determination letter on the continued tax qualified status of the Duke Energy Retirement Cash Balance Plan, as amended and restated effective January 1, 1999 and as amended by Amendments 1 through 6 thereto (the "Duke Energy Plan").

(Exh. D). Additional copies of the IRS Notice were produced by defendants in discovery. (*See, e.g.,* Exh. F).

In lieu of a specific request for determination letter materials—or for any other specific category of documents—plaintiffs propounded a series of vague and non-specific requests for, among other things, (1) documents that “relate to any claim or defense in this action,” (2) documents “which evidence, relate to, corroborate, or contradict the allegations of the Complaint and/or Answer,” (3) documents “relating in any way to the events set forth in the Complaint herein,” and (4) documents “which relate in any way to the issues presented in this action.”³ (Exh. C, Nos. 3, 4, 12, 13). In response to these generic requests, defendants undertook significant efforts to produce documents and reviewed a large universe of material. Defendants reviewed hundreds of thousands of pages of documents over a period of approximately five months and produced over 100,000 pages of documents to plaintiffs.

In May of 2007, defendants served their written responses and objections. (Exh. C). Because Duke prepares Plan-related documents on a regular and ongoing basis, defendants specifically stated as follows:

[T]he administration of the Plan is ongoing, and it would not be feasible to make a continuous production of all of the documents that are within the company’s possession that may relate to the Plan. If plaintiffs wish to obtain documents that post-date the document collection effort that defendants undertook to make the instant production, plaintiffs will need to narrow the scope of their Requests and the parties will need to meet and confer regarding the appropriate scope and timing of any supplemental production.

³ In response to Duke’s earlier assertion that plaintiffs’ document requests were “vague and non-specific,” plaintiffs cite to other document requests. But those requests are equally vague and non-specific. (*See* Pls.’ Br. at 8-9, citing to “Interrogatory # 4 (asking Duke to identify... correspondence/emails that *relate in any way to the Plan*); Request for Production #1 (documents identified in your interrogatory answers), and Request for Production #15 (correspondence with nonparties that *relates in any way to issues*).” (emphasis supplied).

(*Id.* at 5, ¶ 11) (“Objection 11”). Plaintiffs did not request to meet and confer to discuss whether plaintiffs wished to receive a supplemental production of specific categories of documents that were prepared after defendants’ initial collection.

The declaration filed by plaintiffs’ counsel in an attempt to circumvent Duke’s objection to ongoing supplementation is erroneous. The declaration contends that plaintiffs’ counsel had a conversation with defense counsel regarding Objection 11 and that, notwithstanding the explicit statement in the objection, Duke said that it would nevertheless continue to supplement its prior production, which was substantial, on an open-ended, rolling basis provided the documents were not “routine,” whatever that means. (*See Perkins Decl.*) (Dkt. # 284). No such conversation or agreement took place, and plaintiffs were plainly aware that Duke was *not* supplementing its production on an ongoing basis. Nowhere in the parties’ extensive correspondence is there a single request for Duke to supplement its production regarding the IRS determination letter application or a request for Duke to continue to produce documents on a rolling basis in the face of Objection 11. (*Cf.* August 14, 2007 correspondence) (Exh. G); (Kelly Decl.); (King Decl.); (Johnson Decl.) (Group Exh. H).⁴ Additionally, none of the correspondence supports plaintiffs’ characterization of Duke’s position regarding Objection 11. On the contrary, Objection 11 references multiple topics, and the September 13, 2007 letter illustrates that defendants only

⁴ Plaintiffs’ counsel’s statement that plaintiffs’ “significantly narrow[ed] their requests for production as a result of the meet and confer conferences” is an overstatement and fails to address Objection 11. (*Perkins Decl.* at 2, ¶ 6). The eliminated categories were very limited in scope (*e.g.*, “[d]ocuments related to individual plan participants’ qualified domestic relations orders” and “[d]ocuments related to military leave guidelines”), and the correspondence cited by plaintiffs does not contain any promise that Duke would make an ongoing rolling production in contravention of Objection 11. (Group Exh. I). *See also Aikens v. Deluxe Fin. Servs.*, 217 F.R.D. 533,538 (D. Kan. 2003) (finding that, despite plaintiffs attempts to limit their overbroad requests, because plaintiffs continued to seek information or documents “‘regarding’ or ‘relating to’ this lawsuit,” plaintiffs amended requests remained overbroad).

agreed to produce two predecessor company plan documents.⁵ (Exh. J at ¶ 2(c)). Plaintiffs' belated attempt to address Objection 11 only underscores that the dispute regarding the timing of the IRS-related production may have been avoided if plaintiffs had availed themselves of defendants' offer to meet and confer. Indeed, once plaintiffs requested supplementation regarding the IRS determination letter, Duke agreed.

II. THE RULE 30(b)(6) DEPOSITION.

Plaintiffs' complaints regarding the Rule 30(b)(6) deposition pertain to *one* question that was posed in the course of the 225-page deposition and to an objection to a separate question about a different IRS determination letter that Duke received back in April of 1998. The question, "do you remember discussions or drafts where anyone talked about 5.04(c)[,]" was preceded by a long line of questions about the drafting of Section 5.04(c) in 1998 and 1999. Plaintiffs' motion provides selective quotations from the transcript. They take both the question and objection out of context and inaccurately claim that Duke's counsel did not prepare the witness for identified topics and then precluded questioning of facts known to the witness. The witness was properly prepared for the 15 topics identified by plaintiffs in their deposition notice and Duke properly objected to inquiries about matters not identified in the notice. Moreover, Duke coupled its objection to inquiry regarding areas not included in the notice with a statement that the witness would answer any questions about determination letters that were within his personal knowledge at his individual deposition, which was to immediately follow the 30(b)(6) deposition. Plaintiffs' counsel then agreed to wait for the witnesses' personal deposition to ask additional questions, but did not follow up when the time came.

⁵ Plaintiffs' reference to paragraph 3(b) of the September 13, 2007 letter discusses Rule 26(a) disclosures, not Objection 11.

A. The Noticed Topics Did Not Include the Determination Letter Process.

Rule 30(b)(6) requires the party requesting the deposition to “describe with reasonable particularity the matters for examination.” FED. R. CIV. P. 30(b)(6). Plaintiffs noticed such a deposition of Duke, and identified 15 categories for inquiry. The identified subjects were wide ranging, covering many—but not all—of the issues raised by the pleadings. Plaintiffs requested testimony regarding:

1. Role of William M. Mercer Incorporated, from 1996 to present date regarding the Duke Energy Retirement Cash Balance Plan [f.k.a. the Duke Power Company Retirement Cash Balance Plan (1997)/Duke Energy Corporation Retirement Cash Balance Plan (July 1997)/Duke Energy Retirement Cash Balance Plan (1999)], hereinafter the “Duke Cash Balance Plan” or “Plan” including Mercer’s service agreement with Duke, Mercer’s compensation and source of compensation.
2. Role of Hewitt Associates, from 1996 to present date regarding the Duke Energy Retirement Cash Balance Plan [f.k.a. the Duke Power Company Retirement Cash Balance Plan (1997)/Duke Energy Corporation Retirement Cash Balance Plan (July 1997)/Duke Energy Retirement Cash Balance Plan (1999)], hereinafter the “Duke Cash Balance Plan” or “Plan” including Hewitt’s service agreement with Duke, Hewitt’s compensation and source of compensation.
3. ERISA Section 204(h) compliance regarding the 1996-1997 amendments converting Duke’s traditional defined benefit Retirement Plan to a cash balance plan.
4. ERISA Section 204(h) compliance regarding Duke’s 1999 plan amendment to the cash balance plan.
5. Adoption of the 1996-1997 plan amendments to Duke’s traditional defined benefit Retirement Plan which created the cash balance retirement plan, including dates of execution, adoption, and dates of finalization of opening balances shown on attachments to the cash balance plan.
6. Interest rates used for crediting to participant’s balances for the years 1997 and 1998.
7. Whipsaw calculations involving the Duke Cash Balance Plan, including, but not limited to calculations such as those found in the “Duke Energy ‘Whipsaw Lump Sum report (Total Lump Sum Count/Amount by Quarter)” found at Duke document# DE080322-23 [sic].

8. Formulation, implementation and interpretation of Section 5.04(c) language contained in 1999 amendment to the Duke retirement plan.
9. Revisions to opening cash balances of participants in Duke Cash Balance Plan after the four step formula computation communicated to Duke employees in October of 1996 and the spring/summer of 1997.
10. Formulation, implementation and communication of “step five” to the opening balance calculation.
11. Employee communications regarding contemplated and actual plan conversion creating the Duke Cash Balance Plan, including Summary Plan Description.
12. Retirement Plan funding (excluding investment choices) from 1995 to date for all Duke retirement plans.
13. Duke cash balance plan accrual patterns in terms of ERISA Section 204(h), wearaway, ERISA anti-backloading rules, and applicable age discrimination rules.
14. Manner of calculating initial opening balances for all participants in the Duke Power Company Employee’s Retirement Plan who were participants in the Duke cash balance plan starting [sic] on January 1, 1997.
15. Audits by the Duke Internal audit department of the opening balance calculations of the Duke Cash Balance Plan.

(Rule 30(b)(6) Notice) (Exh. K).

Plaintiffs did not identify anything in connection with the IRS determination letter process in the deposition notice. Nevertheless, at the deposition, counsel for plaintiffs identified two pages from a September 4, 1997 determination letter application to the IRS – a different application than the one at issue here – and began to question the witness about the document.⁶

(See Rule 30(b)(6) Deposition at pp. 184-85) (Group Exh. L). Duke’s counsel objected, leading to the following colloquy:

⁶ The questions were not about the determination letter request now at issue. Plaintiffs had alleged that Duke had not provided the IRS with all necessary information in connection with that earlier application. Duke objected to such questions at a 30(b)(6) deposition because the subject had not been identified in the deposition notice.

MR. JOHNSON: Before we go on, is there a 30(b)(6) topic on IRS determination letters because I wasn't aware of one?

MR. GILREATH: I don't know whether there is or not, but I'm going to ask him some questions anyway.

MR. JOHNSON: Well, it's problematic because we have an obligation to prepare a witness for what you tell us you're going to be asking him about. And when you go off topic, he –

MR. GILREATH: I – I thought it was –

MR. JOHNSON: – he hasn't been prepared for that.

MR. GILREATH: I thought it was on there. If not, I'll ask him about –

MR. JOHNSON: I mean, he's got his personal dep following this and to the extent he has personal knowledge, obviously you'll be able to get at it in that. But you're now asking questions of Duke and I certainly have not prepared him to be a Duke witness on an IRS determination letter because it wasn't one of the categories identified.

MR. GILREATH: Well, I – I guess I'll – it – it re – it's going to relate to some of the other issues that are on here so I'm going to go into it. You can make your – you got your objection on the record.

MR. JOHNSON: Yeah. I guess –

MR. GILREATH: Well, I – I don't guess I want to jump around. Do we – or you want me – *you tell me what you prefer*. I'm going to ask him about it whether it's personal or Duke.

MR. JOHNSON: Certainly I'd prefer it be asked personally. You're – and – and whatever personal knowledge he has, I recognize he's an officer of Duke and it's going to be – that's going to be attributed to Duke, but there is a difference between 30(b)(6) and the personal dep.

MR. GILREATH: I don't understand. I thought it was –

MR. JOHNSON: Yeah. And –

MR. GILREATH: – in there but I can't find my copy of it.

MR. JOHNSON: *I know you'll get it out of him today or tomorrow morning, one or the other. I'm not foreclosing you from inquiry.* I just want to – I'd rather it was in the personal deposition that it – that it take place.

MR. GILREATH: Well, let me look at the 30(b)(6) to be sure it isn't – all right. I don't – I'll just come back to that.

MR. JOHNSON: Okay. What don't we do that when –

MR. GILREATH: Well –

MR. JOHNSON: – we reconvene for his second session.

MR. GILREATH: Is your position going to the same thing on the determination letter?

MR. JOHNSON: Yes.

MR. GILREATH: All right.

(*Id.*) (emphasis supplied).

B. The Witness Accurately Answered Questions Regarding Section 5.04(c).

Section 5.04(c) of the Plan was a noticed topic for the deposition, and the witness knowledgeably answered questions about that subject. The only challenged question was the penultimate inquiry in a string of questions that cover almost four pages of the transcript:

Q: Well, I want to come back to 5.04(c).

A. Uh-huh.

Q. And can you tell me, what's the purpose of that section?

A. Let me get back to 5.04(c). I think the purpose of that section was to look at what could happen if the interest crediting rate dropped below 4 percent.

Q. You're talking about if – you're talking about if – you're talking about crediting to people's accounts?

A. Yes. If – if the basis used for the interest crediting rate dropped below 4 percent.

Q. I think the interest crediting rate if we go back and look at that, it already had a 4 percent floor, didn't it, if you look at 2.38?

A. Yes, sir, it did.

Q. And is there – there's nothing – I mean, this thing's talking about a lump sum distribution. Now explain to me as the official 30(b)(6) designee of Duke Power what a

lump sum distribution's got to do with anything on interest credits to somebody's account.

MR. JOHNSON: Object to the form.

A. So, again, you're – you're trying to establish 5.04(c), what that has to do with the lump sum distribution? Is that – is that the question?

Q. I mean, it – let me put it this way: It's got the words lump sum distribution in it, doesn't it?

A. Yes, sir.

Q. And – and y'all had some pretty high-powered lawyers and consultants involved in drafting this thing, didn't you?

MR. JOHNSON: Object to the form.

A. I mean, it was –

Q. You had some people Mercer [sic]. They were experts?

A. Mercer was not involved in the '99 plan drafting.

Q. Okay. Who – who was involved in that?

A. This would have been internal ERISA counsel and at that time our external ERISA counsel was Alston & Bird.

Q. So you're going to lay 5.04(c) at the foot of your in-house lawyers and your out-house lawyers over at Alston & Bird, correct?

MR. JOHNSON: Object to the form.

BY MR. GILREATH:

Q. Is that right?

A. I mean, they – they wrote the plan document, yes.

Q. Okay. And Mercer – neither Mercer nor Hewitt had anything to do with drafting that language, correct?

A. No, they did not.

Q. But whoever it was, Alston & Bird or somebody in the in-house counsel, whoever that was, they wrote the words lump sum distribution in there, didn't they?

A. Those words are in there, yes, sir.

Q. And we got to assume they put them in there for some reason, don't we?

A. I would assume so.

Q. Okay. And who in Duke's in-house counsel would have been involved in drafting that section?

A. At -- at the time of this amendment, that would have been Mark Kelso --

Q. Okay.

A. -- who was our internal ERISA attorney.

Q. And where is -- is Mr. Kelso still employed with Duke?

A. No, he's not.

Q. Where is he? Where are we going to find him? I may know but I've forgot.

A. I believe he still lives in Charlotte. He -- he does some work currently though for Spectra Energy. He's not employed by Spectra Energy, but he does some contract work I believe there that's located out of Houston.

Q. So he's in Houston? Okay. Was anybody else other than him involved in this?

A. In -- internally I -- I'm not aware of anybody else.

Q. Do you remember any discussions or drafts of the plan where anybody talked about 5.04(c)?

A. No, not that I'm aware of.

Q. Okay. And would you agree with me that the word lump sum distribution is not in there only once, it's actually in there twice, isn't it, in the third line, and the first and second line?

A. It is in -- in 5.04(c) twice, yes, sir.

(Group Exh. L at pp. 163-67). Mr. Jefferies understood the challenged question to refer to the same subject as the multiple questions that preceded it as well as the one that followed: the 1998-

1999 drafting and adoption of Section 5.04(c) by Duke. (*See* Defendants' Answers to Supplemental Interrogatories of December 14, 2009) (Exh. M).

ARGUMENT

Plaintiffs' motion to abrogate seeks discovery of privileged, work product materials. The motion does not contend that any of the documents plaintiffs seek do not fall within the scope of privilege or work product. Rather, they argue that Duke has engaged in a pattern of so-called discovery abuse that calls for application of the crime/fraud exception as to certain classes of documents.⁷ The claimed discovery abuses did not occur,⁸ and even if plaintiffs had substantiated their frivolous claim that Duke had wrongfully delayed production of less than one box of documents and led a witness to inaccurately answer one question, they would not be entitled to the draconian remedy they seek.

I. THERE WAS NO MISCONDUCT.

Plaintiffs claim that Duke violated duties to supplement discovery, to educate a 30(b)(6) witness and to be candid with plaintiffs' counsel and the Court. Each contention is incorrect.

A. Duke Did Not Violate a Duty to Supplement Discovery.

Plaintiffs argue that all documents regarding the IRS determination letter process should have been produced under the duty to supplement in Federal Rule 26(e). Even assuming this is

⁷ Duke does not, by this opposition, admit to having documents that fit any or all of the enumerated categories requested by plaintiffs, who assume that such documents exist. (Pls.' Br. at 4-5).

⁸ The substantial majority of plaintiffs' motion repeats arguments that have already been briefed in connection with plaintiffs' previous Motion to Compel, filed on January 5, 2010 (Dkt. # 263). For example, defendants have already addressed the IRS' position regarding whipsaw in their prior opposition brief (Dkt. # 271 at 5-8). Plaintiffs state that the IRS believed "Duke was, in fact, required to perform whipsaw calculations." (Pls.' Br. at 14). This statement is not accurate. The IRS never believed that the Plan was operated illegally or that Duke was required to make any whipsaw payments to Plan participants. Rather, the IRS issued a favorable determination letter to the Plan in 2009, "subject to" the adoption of retroactive plan amendments that provided that Duke would pay only the account balance when making a lump sum distribution, as it always had. The IRS determination letter supports defendants' position that plaintiffs' whipsaw claim is without merit.

so, Duke has complied. It did supplement its production, and plaintiffs have had a full opportunity to conduct discovery of these matters.

Duke promptly produced a copy of the 2009 Plan document that referenced the revision to Section 5.04(c). Thereafter, Duke produced a copy of the 1999 Plan amendment, which referenced the favorable determination letter for the 1999 Plan. When this led plaintiffs to request additional discovery, Duke agreed. There was no need for court intervention, except to enter an agreed scheduling order for the discovery, and no motion to compel was ever brought.

Nor is Duke guilty of undue delay in supplementation, even if it is assumed that such conduct could support any relief. Plaintiffs never propounded a proper discovery request for documents regarding the IRS determination letter proceeding. And Duke's discovery responses were not "incomplete or incorrect" in a "material respect," as required by Federal Rule 26(e), by virtue of not earlier producing these materials. FED. R. CIV. P. 26(e). Finally, plaintiffs did not and cannot identify any prejudice as a result of the alleged delay.

1. The materials were not the subject of a proper discovery request.

As noted above, from the outset of this litigation, plaintiffs were aware that Duke had filed a request for a determination letter with regard to the 1999 Plan amendment and restatement, and they were also aware that Duke had received a determination letter regarding the prior 1997 version of the Plan. Despite this knowledge, plaintiffs did not propound even one request for materials related to the IRS determination letter application, but instead propounded only overbroad requests written in generalities.

Plaintiffs' attempt to argue in hindsight that these requests mandated a continuous supplementation of the IRS material does not comply with Federal Rule 34, which mandates that discovery requests "must describe with reasonable particularity each item or category of items to

be inspected.” FED. R. CIV. P. 34(b)(1)(A). For example, the court in *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641 (10th Cir. 2008), found plaintiffs’ requests for “all” documents relating to certain broad categories to be overbroad, stating, “parties to civil litigation are given broad discovery privileges. But with those privileges comes certain modest obligations, one of which is the duty to state discovery requests with ‘reasonable particularity.’ All-encompassing demands of this kind take little account of that responsibility.” *Id.* at 649 (internal citation omitted). Later, the court also noted, “[i]n overseeing document production, the court should...prevent indiscriminate, overly broad, or unduly burdensome demands...such as those for ‘all documents relating to or referring to’ a...claim....” *Id.* at 650 (quoting Manuel for Complex Litigation § 11.443, at 75); *see also Belk v. Meyer Corp.*, 2009 WL 703704, at *4 (W.D.N.C. Mar. 16, 2009) (request that sought “‘all correspondence’ from unidentified parties ‘relating’ to a very wide subject matter” was “excessively vague,” especially given that it did “not limit the time frame, [did] not identify any individuals or entities for the requested correspondence, and [did] not even describe any reasonably specific classes of documents.”) (unpublished citations at Group Exh. N); *In re Asbestos Prods. Litig.*, 256 F.R.D. 151, 157 (E.D. Pa. 2009) (“‘All-encompassing demands’ that do not allow a reasonable person to ascertain which documents are required do not meet the particularity standard of Rule 34(b)(1)(A)[,]” such that requests for “‘any and all documents...related to’” certain topics “are unreasonable, overbroad, and unduly burdensome.”); *Cardenas v. Dorel Juvenile Group, Inc.*, 232 F.R.D. 377, 382 (D. Kan. 2005) (“a request may be overly broad or unduly burdensome on its face ‘if it is couched in such broad language as to make arduous the task of deciding which of numerous documents may conceivably fall within its scope.’ A request seeking documents ‘pertaining to’ or ‘concerning’ a broad range of items ‘requires the respondent either to guess or to move

through mental gymnastics...to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request.”); *Aikens*, 217 F.R.D. at 538 (finding that plaintiff’s requests for “all documents ‘regarding specific litigation’” and any documents “that ‘relate[] to litigation involving the plaintiff’” were unduly burdensome on their face).

Despite the inadequacy of plaintiffs’ requests, defendants made a good faith effort to respond, subject to vagueness objections, and produced a large volume of documents. But Duke did not agree to an overarching and open-ended duty to supplement such hopelessly broad requests, and it expressly informed plaintiffs it would not do so. This was entirely appropriate. *See Ponca Tribe of Indians v. Cont’l Carbon Co.*, 2006 WL 2927878, at *4 (W.D. Okla. Oct. 11, 2006) (Rule 26 “imposes...a duty to be aware of Plaintiffs’ discovery requests and when information arises that renders a prior response incomplete or incorrect, it must be supplemented. However, there is no obligation to undertake a continuous search for responsive material.”). Thus, the facts here are not like those in *Bartlett v. Mutual Pharmaceutical Co., Inc.*, 2009 WL 3614987 (D.N.H. Nov. 2, 2009), cited by plaintiffs. (Pls.’ Br. at 24). In *Bartlett*, the court found that the duty to supplement had arisen because “[p]laintiffs made a very specific request for [the documents], which the parties expressly discussed at a court-ordered conference.” *Id.* at *4.⁹ Further, the court stated that, “[u]nlike a broad request for all documents relating to a given topic, which can present a complex challenge for document collection and review, this request targeted a discrete and easily identifiable set of [documents].” *Id.*; *see also D’Onofrio v. SFX*

⁹ Plaintiffs argue that an April 9, 2008 letter from plaintiffs’ counsel should have alerted Duke to the fact that plaintiffs were also seeking current documents related to the determination letter process. (Pls.’ Br. at 26 n.20; Exh. 19). To the contrary, the letter requested several categories of documents that were logged on defendants’ privilege log in connection with defendants’ initial document production. (*Id.* at Exh. 19). The letter did not request supplemental discovery or current IRS-related documents.

Sports Group, Inc., 247 F.R.D. 43, 48 (D.D.C. 2008) (“A motion to compel is appropriate only where an appropriate request is made of the responding party.”); *Raghavan v. Bayer USA, Inc.*, 2007 WL 2099637, at *4 (D. Conn. July 17, 2007) (“The court will not compel discovery that has not been sought.”).¹⁰

2. The determination letter materials did not make prior responses incomplete or incorrect.

Federal Rule 26(e) mandates that a party supplement its discovery responses only “if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” FED. R. CIV. P. 26(e); *Option One Mortgage Co. v. Univ. Mortgage Group, Inc.*, 2008 WL 6928158, at *1 (D.S.C. Aug. 27, 2008); *see also Colon-Millin v. Sears Roebuck de P.R., Inc.*, 455 F.3d 30, 37 (1st Cir. 2006) (the duty to supplement arises when “the party learns that the [previous] response is in some material respect incomplete or incorrect and the other party is unaware of the new or corrective information.”); *Gipson v. Sw. Bell Tel. Co.*, 2009 U.S. Dist. LEXIS 111947, at *11 (D. Kan. Sept. 28, 2009) (“The duty to supplement is triggered only where a party, or more frequently, the party’s attorney, obtains actual knowledge that a prior response is incorrect in a material way.”). The documents plaintiffs seek regarding the determination letter application do not render any of Duke’s prior responses incorrect in any material way, and in fact, only support the documents

¹⁰ The additional authority cited by plaintiffs is inapplicable because the propositions cited by those cases only apply if previous discovery responses were “incomplete or incorrect.” *See AVX Corp. v. Cabot Corp.*, 252 F.R.D. 70, 77 (D. Mass. 2008); *Arthur v. Atkinson Freight Lines Corp.*, 164 F.R.D. 19, 20 (S.D.N.Y. 1995). As discussed *infra*, Duke’s responses were not “incomplete or incorrect” in “some material respect.” *See* FED R. CIV. P. 26(e).

previously produced.¹¹ Plaintiffs now attempt to pick and choose hearsay statements from the IRS out of various documents, but the undisputable fact is the IRS issued a favorable determination letter and concluded that the Plan properly paid the account balance as a lump sum. This is why Duke offered to stipulate that the IRS position be dispositive on plaintiffs' whipsaw claim, and also why plaintiffs rejected the offer. (Pls.' Br. at 3-4). This is also why plaintiffs are reduced to advancing the meritless argument that they were deprived of the opportunity to convince the IRS to impose whipsaw obligations on Duke. Plaintiffs have had a full opportunity for discovery regarding the IRS process and have rejected a stipulation to be bound by the IRS' determination regarding whipsaw: there is no genuine dispute as to which side's position is supported by the IRS.

Plaintiffs also claim that Duke should have revised its Local Rule 26.03 responses (Dkt. # 64) which asserted that the Plan was approved by "appropriate governmental agencies." (Pls.' Br. at 9). But that response was true when made and remains true. In April of 1998, Duke received a favorable determination letter from the IRS with respect to Duke's conversion to a cash balance design ("1997 Plan"). (Exh. O). In February of 2009, the IRS issued the favorable determination letter with respect to the 1999 Plan and reaffirmed that no whipsaw payments were required. (Exh. B). The Plan has never been denied a favorable determination letter. And, as the IRS Notice illustrates, plaintiffs had an opportunity to submit comments to the IRS regarding

¹¹ Plaintiffs emphasize that Robert Ringel testified that he forwarded some of the e-mails regarding the IRS determination letter proceeding to Sidley Austin LLP ("Sidley") because he "wanted to keep Sidley in the loop." (Pls.' Br. at 10-13; Pls.' Exh. 3). This testimony does not establish an alleged failure to comply with Rule 26(e). It was entirely reasonable of Mr. Ringel to inform Sidley of matters relating to the Plan, and the fact that Mr. Ringel corresponded with Sidley does not abrogate Rule 26(e)'s requirement that supplementation is required only if the prior discovery responses are incomplete or incorrect in some material respect. In addition, contrary to plaintiffs' statement, Priscilla Ryan of Sidley has filed an appearance in this case. (Dkt. # 69). (*Cf.* Pls.' Br. at 11 n.11).

the determination letter application but declined to do so. (Exh. D at 3). The Local Rule response has at all times been accurate.¹²

3. Plaintiffs have suffered no prejudice.

After plaintiffs requested the IRS-related documentation, this Court reopened fact and expert discovery by agreement of both sides and extended the case management deadlines accordingly. (Dkt. # 258). Duke produced one box of additional documents, produced Mr. Jefferies for a second deposition, and produced a Rule 30(b)(6) witness to testify about the IRS determination letter process. Plaintiffs obtained the additional discovery they requested, and they cannot demonstrate that they have been prejudiced by virtue of defendants' alleged delay in supplementing the document production. *Cf. CBRE Finance TRS, LLC v. McCormick*, 2009 WL 4782124, at *5 (D. Md. Dec. 8, 2009) (rejecting defendants' requested relief for plaintiffs' failure to supplement pursuant to Rule 26(e) because "Defendants have not suggested any prejudice arising from the Plaintiff's failure to supplement, nor can they."); *Harwood v. United States*, 2009 WL 1506723, at *4 (S.D. W.Va. May 27, 2009) (denying government's requested relief due to plaintiffs' Rule 26 violations because prejudice to government was "minimal" and could be remedied by ordering disclosure); *Dunhem v. Suntrust Banks, Inc.*, 2006 U.S. Dist. LEXIS 97222, at *8 (D. Md. Mar. 2, 2006) ("Because Defendant has had a chance to examine the witness, Plaintiffs' failure, [sic] to comply with the requirements of *Rule 26(a)(2)* did not cause Defendant prejudice[,] and exclusion of testimony was inappropriate).

Plaintiffs make a bald statement that "in-depth discovery would have been taken on the matter, depositions would have been handled differently, and additional depositions would have ensued" had production occurred earlier. (Pls.' Br. at 24). But they fail to identify any

¹² Nor was there any inadequacy in defendants' Rule 26(a) disclosures.

additional depositions they would have taken, other than the two they took after the production occurred, or describe any specific way in which discovery would have been handled differently. The *post-hoc* assertion that plaintiffs would have altered their discovery strategy lacks any support whatsoever in the record. Moreover, discovery was reopened and plaintiffs were permitted to take additional discovery regarding the IRS determination letter application pursuant to agreed-upon deadlines proposed by plaintiffs.

As opposed to asserting the existence of any prejudice in their prosecution of this litigation, plaintiffs make the hypothetical and unsubstantiated assertion that if “[p]laintiffs had been apprised of the IRS proceeding and been given the opportunity to participate, a very different outcome may have ensued.” (Pls.’ Br. at 27).¹³ As an initial matter, however, plaintiffs knew about the IRS determination letter application since before the inception of this litigation and were advised that they had a right to contact the IRS.¹⁴ They never exercised that option. Because they did not timely exercise the right to comment, plaintiffs long ago waived any right to be heard in connection with the determination letter process. The IRS Notice provided to plaintiffs on November 26, 2001 informed them of their right to submit “comments to the IRS regarding the Plan’s qualification, the process for submitting your comments to the IRS or the process to request the U.S. Department of Labor to submit concerns to the IRS on your behalf.” (Exh. D). But the deadline for providing such comments to the IRS was January 28, 2002. (*Id.* at 3). (“Comments submitted by you to the Key District Director must be in writing and received

¹³ Plaintiffs’ longing for a “different outcome” makes clear that the conclusion reached by the IRS was not favorable to their position.

¹⁴ Moreover, the fact that the IRS lifted its moratorium on its consideration of applications for determination letters in 2006 was a matter of public record. (*See* Press Release, “IRS to Begin Processing Suspended Cash Balance Plan Conversion Applications,” dated December 21, 2006) (available at www.irs.gov).

by him by January 28, 2002.”). (*Id.*). Plaintiffs did not have the right to comment on the determination letter request at any time during this lawsuit. Finally, plaintiffs’ disparagement of the IRS, contending that it somehow “knuckled under” to pressure from Duke when issuing the favorable determination letter, is bereft of factual support. (Pls.’ Br. at 27). There is no basis in the record for plaintiffs’ speculation that the IRS was coerced into a position it did not believe to be correct.¹⁵ Indeed, plaintiffs’ current argument of a pliant IRS bending to the demands of Duke is inconsistent with the statement they made just a short time ago, in their prior motion to compel on this same matter, where they asserted that Duke was “forced to draft a plan amendment by the IRS to achieve ERISA and Tax Code compliance.” (Dkt. # 263 at 19).

B. Duke Did Not Violate the Duty to Educate a Rule 30(b)(6) Witness.

As noted above, plaintiffs’ challenge to the preparation of the 30(b)(6) witness relates to the following single question: “do you remember discussions or drafts of the plan where anyone talked about 5.04(c)?” That question, preceded by a long line of questions about the drafting of Section 5.04(c) in 1998 and 1999, was understood by Mr. Jefferies to relate to the period on or before January 1, 1999 when Section 5.04(c) of the Plan was drafted. (Dkt. # 271 at 12) (*See* Group Exh. L at pp. 164-167). After recently asserting that Mr. Jefferies answered the question incorrectly, (Dkt. # 269 at 4), plaintiffs have changed their theory and now argue that defense counsel engaged in an elaborate scheme to keep Mr. Jefferies “in the dark” so that he was unable to testify about the IRS determination letter process in response to this question. (Pls.’ Br. at 15). The witness’ preparation had nothing to do with his understanding of the question. He interpreted it reasonably, consistent with the context in which it arose. In any event, plaintiffs’ manufactured conspiracy theory about Duke’s counsel’s attempts to prepare the witness to avoid

¹⁵ Moreover, the discovery illustrates that the IRS was aware of this lawsuit when it issued the favorable determination letter. (Ringel Dep. at p. 123) (Exh. P).

disclosure is baseless. Plaintiffs were aware of the pending application, and although they were free to do so, plaintiffs did not ask Mr. Jefferies any questions on the subject during his personal deposition.

Furthermore, as plaintiffs concede, there is no duty to educate a witness about topics that plaintiffs did not identify in their Rule 30(b)(6) deposition notice.¹⁶ (Pls.' Br. at 29) ("the Rule 30(b)(6) corporate designee must be prepared to testify concerning the corporate entity's complete knowledge of the issues called for by the notice.") (emphasis supplied). See also *Payless Shoesource Worldwide, Inc v. Target Corp.*, 2008 WL 973118, at *10 (D. Kan. Apr. 8, 2008) ("Rule 30(b)(6) sets a high burden of knowledge, but only regarding the noticed topics, no more and no less."). Plaintiffs bore the responsibility as the "party who had noticed the 30(b)(6) deposition to define as clearly as possible the topics for the deposition." *Newman v. Borders, Inc.*, 257 F.R.D. 1, 3 (D.D.C. 2009); see also FED. R. CIV. P. 30(b)(6) (requiring parties to "describe with reasonable particularity the matters for examination"). The deposition notice requests testimony regarding the "formulation, implementation and interpretation of § 5.04(c)," but does not reference the IRS or the IRS determination letter process. (Exh. K). Duke had no duty to prepare the witness on a subject not identified in the notice. *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (Rule 30(b)(6) defines "what [the Rule 30(b)(6)] witness is obligated to be able to answer.").¹⁷

¹⁶ For this reason, the cases cited by plaintiffs are inapposite. (Pls.' Br. at 28-29). Plaintiffs' cases stand for the proposition that a party has a duty to educate its designated Rule 30(b)(6) deponent about the topics identified in the Rule 30(b)(6) notice.

¹⁷ Plaintiffs' reliance on *Calzaturificio S.C.A.R.P., s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33 (D. Mass. 2001), is entirely misplaced. (Pls.' Br. at 29-30). *Calzaturificio* involves a situation in which the deponent was entirely unprepared for his Rule 30(b)(6) deposition and took the position that he had "no obligation to sit there and read through all the [documents] in preparation for a deposition." *Id.* at 36. This was not the situation here. Rather, Duke did, in fact, educate Mr. Jefferies on all of the *noticed* topics and provided over two hundred pages of deposition testimony.

Plaintiffs seek to rely on Paragraph 8 of the Rule 30(b)(6) notice. (Pls.' Br. at 22) (Exh. K). Paragraph 8 requests testimony regarding the "formulation, implementation and interpretation of Section 5.04(c) language contained in 1999 amendment to the Duke retirement plan." (*Id.*). Duke prepared its witness to answer questions about how that provision came to be adopted, what its purpose was and how Duke interpreted the provision. This was a reasonable understanding of the deposition topic. Moreover, the one question that plaintiffs asked at the deposition that they now contend should have elicited a response regarding the pending determination letter application was reasonably understood by the witness to relate to the period on or before January 1, 1999 when Section 5.04(c) of the Plan was drafted and years *before* Duke filed the determination letter application in 2001. (*Supra* at 13). As shown by the context in which the questions arose—recited above—that was the only logical understanding of the inquiry. Thus, different preparation would not have led to a different answer. (*See also* Jefferies Dep. at pp. 53-56) (Exh. Q).

Plaintiffs also complain about an objection raised to a different line of questioning in connection with the favorable determination letter received by Duke in 1998. (Pls.' Br. at 20). Duke objected and stated on the record that Mr. Jefferies was not prepared to testify about the IRS determination letter process because it was not a topic identified in plaintiffs' Rule 30(b)(6) deposition notice. (Group Exh. L at pp. 185-87). This was not, as plaintiffs claim, a "frivolous" objection. (Pls.' Br. at 34). A corporate party has a duty to produce a knowledgeable witness as to the subjects identified. But an obvious corollary of that duty is that the party taking the deposition must clearly identify the subjects for questioning. Duke could not prepare a witness on subjects that were not identified. There were 15 topics of inquiry: none involved the

determination letter application for the 1997 Plan that plaintiffs sought to address during the Rule 30(b)(6) deposition.

Nor did Duke impose an “information embargo” on the subject of determination letters. (Pls.’ Br. at 20). To the contrary, Duke’s counsel suggested that plaintiffs inquire into any personal knowledge the witness had on the topic at his individual deposition, scheduled right after the 30(b)(6) deposition. (“I’m not foreclosing you from inquiry. I just want to – I’d rather it was in the personal deposition that it – that it take place.”) (*Supra* at 10). Plaintiffs’ wholly unsubstantiated assertion that defense counsel’s objections at the Rule 30(b)(6) deposition were the product of a master plan to preclude Mr. Jefferies from testifying about the IRS determination letter process (*see* Pls.’ Br. at 15, 21) is squarely belied by the record, which demonstrates that plaintiffs were free to ask Mr. Jefferies questions about the IRS determination letter process in his personal capacity. (*Supra* at 9-11). However, during Mr. Jefferies’ personal deposition, plaintiffs chose not to ask him a single question on this subject. (Exh. R).

In addition, after Duke produced additional IRS-related documents, Duke agreed to produce Mr. Jefferies for a second deposition. Duke also produced a Rule 30(b)(6) witness on the topic of the IRS determination letter process. Thus, plaintiffs have obtained any remedy that they could arguably be entitled to seek, namely, another Rule 30(b)(6) deposition. *See, e.g., Cox Commc’ns. of La., LLC v. I.C. Fiber La., LLC et al.*, 2003 WL 22326400, at *1 (E.D. La. Oct. 6, 2003) (“Where corporate designees are not prepared to testify on the topics about which they are to be questioned, it is appropriate that the court order the corporation to re-designate witnesses and mandate their preparation for the renewed deposition.”); *Calzaturificio*, 201 F.R.D. at 41 (because it was “glaringly obvious that [the designees] failed to educate themselves about the

30(b)(6) topics about which they would be questioned...the Motion to Compel is allowed to the extent that [the designees] shall be re-deposed.”).

C. Duke Did not Breach a Duty of Candor.

Plaintiffs’ so-called duty of candor argument is nothing more than a string of misstatements that pertain largely to discovery matters that were mutually resolved by the parties long ago. (Pls.’ Br. at 31-32). Plaintiffs assert that “a review of the issues raised in Plaintiffs’ initial Motion to Compel (Dkt. 119-2),” demonstrates that Duke’s privilege log was inadequate. However, the parties resolved the issues raised in plaintiffs’ motion and the motion to compel was *withdrawn* almost two years ago.¹⁸ (Dkt. # 198). Moreover, defendants agreed to produce additional documents pursuant to the parties’ written non-waiver agreement. It is inappropriate to assert that Duke’s good faith compromises during meet and confer discussions is evidence that Duke’s initial positions were not well-taken.

Plaintiffs inexplicably argue that defense counsel attempted to “hide” the existence of the 1999 Plan amendment, which defense counsel e-mailed to thirteen plaintiffs’ attorneys. (Pls.’ Br. at 32; Exh. 17). Plaintiffs now attempt to redraft the message by contending that the e-mail misidentified the Plan amendment as “an amendment to the 2009 Duke Energy Retirement Cash Balance Plan, as amended and restated effective January 1, 2009.” (Pls.’ Br. at 32). However,

¹⁸ Indeed, some of the documents plaintiffs reference were subsequently withdrawn as non-responsive, some had previously been produced, and some were drafts of letters properly withheld as privileged. (Dkt. # 271 at Group Exh. M). Plaintiffs’ reference to the identification of Duke employees and e-mail addresses was clarified two and a half years ago and was not a “mistake” by defendants, but rather a misunderstanding by plaintiffs. (Group Exh. S). In addition, contrary to plaintiffs’ bare assertion, Duke did not attempt to confer privileged status on non-privileged documents by “funneling them through an attorney,” and disputes over defendants’ privilege log were resolved during the parties’ meet and confer process long ago. (Pls.’ Br. at 32). Plaintiffs’ comment regarding drafts (*id.*) involved a single document that was initially withheld as a draft when it was not signed. Thereafter, defendants produced the document, which has nothing to do with the matters at issue. Finally, plaintiffs’ request for sanctions based on the font size in one portion of defendants’ privilege log is baseless. (Pls.’ Br. at 3 n.1). That particular section was submitted to plaintiffs as a preliminary draft to expedite the exchange of information and was revised two days later in 2007.

the e-mail actually stated, “attached please find amendments to the Duke Energy cash balance plan, as amended and restated effective January 1, 2009.” (Pls’ Br., Exh. 19). The e-mail reflected the proper nomenclature for the 1999 Plan at the time of the e-mail: it was, in fact, amended and restated effective January 1, 2009. In addition, counsel stated that they promptly reviewed the attachment.

Finally, plaintiffs falsely state that defense counsel improperly argued in a court hearing held on December 19, 2007 that the 1999 Plan was a safe-harbor plan under IRS Notice 96-8. (Pls.’ Br. at 13-14). This argument was proper, as already established in Duke’s response to the motion to compel plaintiffs filed in January. (Dkt. # 271 at 13-14). Duke received a favorable determination letter from the IRS prior to that court hearing, and the IRS issued another favorable determination letter in February 2009. Not only was the latter determination letter issued without requiring any whipsaw payments, it was expressly “subject to” adoption of Plan amendments that reaffirmed that no whipsaw payment was ever necessary. Duke’s counsel’s argument was supported by the facts and the law: plaintiffs’ rejection of Duke’s offer to stipulate to the IRS position as dispositive on their whipsaw claim shows this more clearly than could any argument by Duke.

II. THE CRIME-FRAUD EXCEPTION DOES NOT APPLY.

There is no support for plaintiffs’ contention that this Court should take the dramatic and unprecedented step of abrogating Duke’s privilege and work product protections by extending the crime-fraud exception to this case. Plaintiffs’ argument that this limited exception to privilege or work product can be extended wherever there are disputes about discovery compliance, or the timing of a document production, is unsupported legally. *See Laser Indus.*,

Ltd. v. Reliant Techs., 167 F.R.D. 417, 424 (N.D. Cal. 1996) (“The looser the standard for the crime/fraud exception, the greater the risk that it will be abused for...tactical purposes.”).

The crime-fraud exception applies only in very limited circumstances, specifically, when “the party invoking the exception [has made] a prima facie showing that (1) the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme, and (2) the documents containing the privileged materials bear a close relationship to the client's existing or future scheme to commit a crime or fraud.” *In re Grand Jury Proceedings #5*, 401 F.3d 247, 251 (4th Cir. 2005) (citing *Chaudry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999)). When addressing opinion work product, the Fourth Circuit has held that “because the attorney, as well as the client, has the right to assert the opinion work product privilege, a prima facie case of crime or fraud must also be made out against the attorney for the exception to apply.” *In re Grand Jury Proceedings #5*, 401 F.3d at 252 (citing *In re Grand Jury Proceedings*, 33 F.3d 342, 349 (4th Cir. 1994)). Therefore, “while the attorney-client privilege may be vitiated without showing that the attorney knew of the fraud or crime, those seeking to overcome the opinion work product privilege must make a prime facie showing that the ‘attorney in question was aware of or a knowing participant in the criminal conduct.’” *In re Grand Jury Proceedings #5*, 401 F.3d at 252 (quoting *In re Grand Jury Proceedings*, 33 F.3d at 349).

The importance of protecting attorney work product from disclosure is well-recognized by courts.¹⁹ *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (“Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney.”); *In re Richard Roe*, 168 F.3d 69, 72 (2d Cir. 1999) (“Given that the attorney-client

¹⁹ Although plaintiffs refer to abrogation of the attorney-client privilege in their motion, the documents they seek, (Pls.’ Br. at 4-5), to the extent any exist, are documents prepared by attorneys that reflect the opinions of those attorneys in the context of pending litigation. Therefore, plaintiffs are asking this court to abrogate the protection afforded to opinion work product, not only attorney-client privilege.

privilege and work product immunity play a critical role in our judicial system, the limited exceptions to them should not be framed so broadly as to vitiate much of the protection they afford.”) (internal citations omitted). Material that is prepared in “anticipation of litigation” is protected from discovery by a litigation adversary. FED. R. CIV. P. 23(b)(3); *see also Hickman*, 329 U.S. at 508. The Fourth Circuit has determined that opinion work product, which includes the “‘mental impressions, conclusions, opinions, or legal theories’” of an attorney is “‘absolutely’ immune from discovery.” *Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) (internal citations omitted); *see also In re Grand Jury Proceedings*, 33 F.3d at 348 (“opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.”).

Plaintiffs suggest that defense counsel has committed a “fraud on the court” by failing to disclose the discussions with the IRS regarding the determination letter application sooner. (Pls.’ Br. at 33-34). Plaintiffs’ contention is not only factually baseless, as discussed above, plaintiffs misconstrue the applicable law. “‘Fraud on the court’...is confined to the ‘most egregious cases, such as bribery of a judge or juror, or improper influence asserted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged.’” *Outen v. Baltimore County, Md.*, 177 F.R.D. 346, 348-49 (D. Md. 1998) (quoting *Great Coastal Express, Inc. v. Int’l Bhd. of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982)). The cases cited by plaintiffs show the conduct required for application of the crime/fraud exception and make clear the lack of any comparison to the facts here. *See, e.g., In re Sealed Case*, 754 F.2d 395 (D.C. Cir. 1985) (grand jury investigated defendant’s scheme involving destruction of documents and perjured testimony as possible federal crimes); *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982) (evidence that company officers conspired to bribe officials and defraud the

government); *United States v. Ruhbayan*, 201 F. Supp. 2d 682, 686 (E.D. Va. 2002) (government offered sufficient “*prima facie* evidence that, if believed by the trier of fact, establishes the elements of the crime of obstruction of justice.”); *Madanes v. Madanes*, 199 F.R.D. 135, 145-47 (S.D.N.Y. 2001) (“client induce[d] a lawyer to breach his fiduciary duty to a prior client” in violation of the Argentine Criminal Code); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1975) (bad faith antitrust violations). *Cf. Cunningham v. Conn. Mut. Life Ins.*, 845 F. Supp. 1403 (S.D. Cal. 1994) (party sought attorney’s advice for purpose of committing a fraud when he sought affirmatively to misrepresent extent of disability so that disability payments would not cease).

Because of its limited scope, courts have rejected attempts to expand the crime-fraud exception to an alleged violation of discovery rules. For example, in *Johnson Elec. N. Am. Inc. v. Mabuchi N. Am. Corp.*, 1996 WL 191590 (S.D.N.Y. Apr. 18, 1996), plaintiffs argued that the crime-fraud exception should apply because defendants purportedly attempted to “obstruct discovery.” *Id.* at *2. The court emphatically rejected this argument, stating:

The privilege does not yield whenever a party resists discovery demands....If a party resists discovery on a legally mistaken ground, the result should simply be that the court rejects the argument, and the discovery is taken, possibly with an additional proviso for an award of motion expenses under Fed. R. Civ. P. 37(a)(4).

Id. at *5; *see also id.* at *6 (“no court decision of which we are aware has read [the crime/fraud exception] so broadly as to encompass any action by counsel or party that may be viewed as undesirable or improper in view of the important policies embodied in the attorney-client privilege, we are loathe to read into it such a broad-based exception”) (citations omitted); *Jinks-Umstead v. England*, 233 F.R.D. 49, 51 (D.D.C. 2006) (declining to expand crime-fraud exception to alleged inaccuracies and omissions in discovery); *In re Grand Jury Subpoenas Duces Tecum*, 773 F.2d 204, 207 (8th Cir. 1985) (stating that intent to commit a fraud is required

under the crime-fraud exception and holding that the district court was correct in declining “to infer that the government made a prima facie case of fraud or crime from the fact that two documents were not included in the 800 documents surrendered during trial”); *Underwriters Ins. Co. v. Atlanta Gas Light Co.*, 248 F.R.D. 663, 671-72 (N.D. Ga. 2008) (withholding documents during discovery, based on a reasonable belief that they were not discoverable, did not constitute fraud so as to warrant application of the crime-fraud exception); *Kyoei Fire & Marine Ins. Co., Ltd.*, 248 F.R.D. 126, 155 (S.D.N.Y. 2007) (while “criminal charges of perjury and obstruction of justice” could warrant application of the crime-fraud exception, simply “[s]oliciting a false statement for court proceedings” is insufficient to trigger application of the crime-fraud exception.); *Tri-State Hosp. Supply Corp. v. United States*, 238 F.R.D. 102, 105 (D.D.C. 2006) (omissions of alleged critical facts in documents constituting “discrete communications between the attorney and client regarding issues such as how to respond to discovery requests” did not warrant application of the crime-fraud exception); *RCA Corp. v. Data Gen. Corp.*, 1986 WL 15684, at *4 (D. Del. Oct. 27, 1986) (the crime-fraud exception is not triggered by “a mere showing that an attorney has failed to produce certain documents in the course of extensive discovery.”).

Cases cited by plaintiffs applied the crime-fraud exception when a discovery-related abuse rose to the level of intentional spoliation of evidence. For example, *Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 280 (E.D. Va. 2004), involved a party’s implementation of “a document destruction program to destroy documents in anticipation of...litigation.” *Id.* at 287. The party had intentionally destroyed over 20,000 pounds (two million pages) of documents and instituted specific “shred days” in which to destroy these documents. *Id.* at 286-87. The court held that “there is no logical reason to extend the protection of the attorney-client privilege to

communications undertaken in order to further spoliation.” *Id.* at 290; *see also Craig v. A.H. Robins Co., Inc.*, 790 F.2d 1, 3 (1st Cir. 1986) (affirming magistrate judge’s determination that “plaintiff had made a prima facie case that there had been a ‘deliberate studied’ destruction of documents”). Here, there was no spoliation of evidence. On the contrary, defendants have produced the IRS-related documents and completed all of the supplemental discovery that plaintiffs requested.

Plaintiffs’ citation to *Cleveland Hair Clinic v. Puig*, 968 F. Supp. 1227 (N.D. Ill. 1996), is likewise misplaced. In *Cleveland*, the alleged conduct included, among other things, making affirmative misstatements during court proceedings, concealing conflicts of interest from the court, failing to produce any documents, and filing a multitude of frivolous motions. *Id.* at 1239 (citing *Cleveland*, 1996 WL 617147 (N.D. Ill. Oct. 23, 1996)). *Cf. Parrott v. Wilson*, 707 F.2d 1262, 1271 (11th Cir. 1983) (applying crime/fraud exception to allow disclosure of tapes in which counsel “clandestinely recorded conversations with witnesses.”); *Moody v. Internal Revenue Serv.*, 654 F.2d 795, 800 n.17 (D.C. Cir. 1981) (applying the crime/fraud exception based on a party’s admission that he had engaged in unprofessional conduct); *1100 West, LLC v. Red Spot Paint & Varnish Co., Inc.*, 2009 WL 232060 (S.D. Ind. Jan. 30, 2009) (applying crime/fraud exception when there was direct evidence that party had affirmatively lied about the key issue involved in the case and the presence of documents related to that issue).

Plaintiffs’ failure to establish the requisite *prima facie* case for application of the crime-fraud exception also defeats their request for *in camera* inspection. This court may conduct an *in camera* review of documents only if the party seeking discovery has first made “‘a showing of a factual basis adequate to support a good faith belief by a reasonable person’ that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception

applies.” *United States v. Zolin*, 491 U.S. 554, 572 (1989) (internal citation omitted). Plaintiffs did not and cannot make the requisite showing. Accordingly, plaintiffs’ motion to abrogate Duke’s privilege and work product lacks any merit and should be denied.

CONCLUSION

For the reasons stated above, defendants respectfully request this Court to deny plaintiffs’ motion for *in camera* review, to abrogate privilege, and to compel.

Respectfully submitted,

/s/ Robert O. King _____

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CERTIFICATE OF SERVICE

Robert O. King, an attorney, hereby certifies that he caused copies of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR *IN CAMERA* REVIEW, TO ABROGATE PRIVILEGE, AND TO COMPEL** to be served on all counsel through the Court's ECF system on this 22nd day of March 2010.

/s/ Robert O. King